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A TRIBUTE TO PROFESSOR ANDRÉ VAN DER WALT

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As I write this, it has been shortly over a year since André van der Walt passed away at the age of 60 on 5 November 2016 after a two-year struggle with cancer. Many of us who knew and worked with André are still coming to terms with his legacy and the enormity of the loss that his passing represents. I cannot hope to do justice to the full scope of André's legacy as a scholar, so will simply highlight facets of his work that I regard as particularly significant. I take comfort in knowing that this tribute is but one small part of shared, on-going endeavours to reflect on and commemorate André's contribution to South African law by many of his colleagues and former postgraduate students.

At the time of his death he was incumbent of the South African Research Chair in Property Law (which celebrated its 10th anniversary in 2017), and was Distinguished Professor in the Department of Public Law of the Stellenbosch University Law Faculty. Over the course of his career, he published 120 articles in academic journals, 19 books, and 21 contributions to books. Some of these books and articles were written during his period of illness, and published posthumously. Under his supervision, 13 master's and 17 doctoral students completed their postgraduate studies under the auspices of the Research Chair in Property Law. From 2002 he held an 'A' rating from the National Research Foundation, which is reserved for researchers who are unequivocally recognised by their peers as leading international scholars in their field for the high quality and impact of their research outputs. During his career, he has received a large number of national and international accolades for his scholarship, including being one of the first recipients of the highest award made to staff at Stellenbosch University, the Chancellor's Award for research, in 2014.

However, these bare statistics — impressive though they are — cannot capture the profound transformative impact that André had on property law in South Africa. André constructed a new theoretical foundation and interpretative methodology for South African property law in the era of constitutional democracy. In the process he also made a substantial contribution to the development of constitutional law.

Paradoxically, André's most significant contribution to property-law scholarship was to dethrone property rights from their powerful position at the top of the rights hierarchy. Through a range of articles and books, André carefully studied and documented how colonial and apartheid property legislation interacted with, and were reinforced by, common-law property concepts and doctrines to entrench the exclusion and marginalisation of black South Africans from land and property. For André, interrogating and

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reimagining the very nature of property rights as a system lay at the heart of transforming the structural inequalities and socio-economic disparities pervading post-apartheid South Africa. He argued that the necessary reforms would have to go much further, at least in some cases, than the 'business as usual', interstitial dogmatic shifts and adaptions that characterise 'normal' developments of the common law. Inevitably the impetus to effect these fundamental changes to the existing property regime would produce tensions with vested property rights, and the overall tendency of constitutional orders and legal systems to preserve stability and the status quo. However, these tensions, according to André, could also be a fertile source for generating new constitutionally directed property doctrines (see particularly his monograph, A J van der Walt *Property in the Margins* (2009)).

One of André's key insights in developing the theoretical foundations of the new property law is that fixed, clear property rules, even with their qualifications and exceptions, have to make way for 'personal uncertainty and systemic openness' (ibid at 21). As a result, property 'loses its traditional central character and acquires a marginal character' (ibid). Occupying these margins, property law becomes as deeply concerned with those who do not have property, or whose property rights are weak or insecure, as it is with those who enjoy ample, strong rights to property. In André's words (ibid at 241–2):

> 'Marginality involves legal positions not characterised or dominated by the presence of rights, possessions, privilege and power. Thinking and arguing about property in a way that takes the persons in those positions and their interests and circumstances seriously means, at the very least, that we have to try and think away the power and the centrality of rights, entitlements and privileges and to imagine a legal order not dominated by the hierarchies built on the distinction between their presence or absence.'

Moving property rights, particularly the dominant rights associated with ownership, to the margins creates space for the recognition of other rights, values and interests previously unrecognised (or weakly recognised) in our legal system, such as personal circumstances and need, housing, human dignity and substantive equality. A related implication of marginality thinking in property theory is that the adjudication of property-related disputes should be finely attuned to the historical, social and personal context of the parties and the dispute. In a seminal article published in 2014 he argued that property rights had an important, but modest systemic role in relation to other primary values in a democratic society such as human dignity and equality (A J van der Walt 'The modest systemic status of property rights' (2014) 1 *Journal of Law, Property and Society* 15). Memorably, he concluded this article with the following description of the role of property rights in a constitutional democracy (ibid at 106):

> 'I prefer to see property as a gaggle of cleaners who move in after everyone else has left, brandishing buckets and mops, cleaning up the property debris once the real work of maintaining the democratic legal system has been completed.'

By theorising the shift in property from reigning monarch of the legal system to cleaner, André has made it possible for property law, despite

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bearing the heavy burden of its colonial and apartheid legacy, to play a useful, albeit modest, role in the post-apartheid legal system.

The impact of these paradigm-shifting theories on property adjudication in South Africa is aptly illustrated by the two Constitutional Court judgments of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ('*PE Municipality*') and *Daniels v Scribante* 2017 (4) SA 341 (CC) ('*Daniels*'). In *PE Municipality*, the Constitutional Court was called upon to adjudicate an eviction application against unlawful occupiers in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Writing for a unanimous court, Sachs J took care to sketch the historical context and consequences of land and housing dispossession in South Africa, not merely as a backdrop, but as integral to the interpretation of the constitutional and legislative matrix applicable to eviction cases.

This led to the development of a novel approach to adjudicating eviction disputes. In terms of this approach, courts are enjoined to refrain from establishing a hierarchical relationship, which privileges in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather their function 'is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case' (*PE Municipality* (supra) para 23). The *PE Municipality* judgment has led to a new paradigm for adjudicating eviction disputes, one which emphasises the search for contextual, participatory solutions to the tensions between property rights, housing rights and the regulatory powers and duties of organs of state in eviction disputes.

This new paradigm also requires a different adjudicative method. Courts are expected to depart from their traditional role as passive umpire and play an active role in managing the proceedings to produce a just and equitable result (ibid para 36. For a recent application of this approach by the Constitutional Court, see *Occupiers of Erven 87 and 88 Berea v De Wet NO* 2017 (5) SA 346 (CC)). In so doing, they must seek to 'infuse elements of grace and compassion into the formal structures of the law', to 'balance competing interests in a principled way' and to promote 'the constitutional vision of a caring society based on good neighbourliness and shared concern' (*PE Municipality* (supra) para 37). The theoretical foundations of this historically sensitive, contextual and creative adjudicative approach were laid by André's meticulous scholarship.

In *Daniels*, the Constitutional Court held that Ms Daniels, a domestic worker residing on a farm in the Stellenbosch region, was entitled to make modest improvements to her home at her own expense to render it habitable, without the consent of the owner of the farm, but subject to meaningful engagement on the logistical arrangements for the building work. The majority judgment of Madlanga J is infused with a deep appreciation of the historical and social context which shaped and continues to shape the power relationships between farm owners and dwellers in South Africa. The right of an occupier in terms of s 6 of the Extension of Security of

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Tenure Act 62 of 1997 ('ESTA') to reside on the land was interpreted through the prism of the right to human dignity explicitly recognised in s 5 of ESTA. This allowed for the possibility to read-in a right to make improvements to the dwelling, even though s 6 did not explicitly provide for such a right. Key concepts in ESTA such as the right to 'reside' and 'security of tenure' were accordingly interpreted to imply a habitable dwelling of a standard that befits human dignity and its entailments of self-determination and self-expression (*Daniels* (supra) paras 23–35).

In his concurring separate judgment, Froneman J pays explicit tribute to André's pioneering scholarship, particularly his insight that 'the absolutisation of ownership and property and the hierarchy of rights it spawned did not fulfil the purpose of founding political and economic freedom in South Africa' (ibid para 136). A post-apartheid constitutional property-law system will sometimes require changes to the very foundations upon which the current distribution of property rests (Van der Walt *Property in the Margins* op cit at 16). As Froneman J goes on to point out (*Daniels* (supra) para 137), this insight cuts deeper than the redress of historical injustices and racial inequalities. The values of the Constitution speak not only to the past and present, but also the future: 'A future "Ms Daniels" will still be entitled to live a dignified life, no matter the race of the owner.'

In developing the new theoretical foundations of property law in South Africa and working out their practical implications, André also made an important contribution to constitutional law in South Africa. In particular, he was concerned to develop an approach to constitutional adjudication that gave effect to the 'single system of law' principle laid down in the *Pharmaceutical Manufacturers* judgment (*Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44). He demonstrated how the subsidiarity principles developed by the Constitutional Court could strengthen the single-system-of-law principle by illuminating the unifying, systemic relationship between the Constitution, legislation, the common law and customary law (see, for example, A J van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77; A J van der Walt *Property and Constitution* (2012) ch 2).

André argued that applying subsidiarity principles to seemingly overlapping sources of law (constitutional text, legislation, common law and customary law) had had important benefits. By applying legislation enacted to give effect to constitutional rights, it affirmed the important role of the democratically elected legislature in giving shape and substance to broadly formulated constitutional norms (Van der Walt *Property and Constitution* op cit at 100–3). Secondly, it helps guard against the courts' ignoring or minimising constitutional provisions (or new laws enacted under them) and deciding cases in terms of traditional common-law rules or doctrines, with possible counter-transformative results (ibid at 104–5).

However, André was at pains to emphasise that subsidiarity principles are not to be conflated with avoidance of the Constitution and its normative

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value system. Whatever the relevant source of law, it must be interpreted, applied, or where necessary, developed to promote and advance the 'spirit, purport and objects' of the Bill of Rights, as required by s 39(2) of the Constitution. This entails both interpreting legislation through a constitutional prism, and developing the common law and customary law to align with the direction-giving normative purposes and values of the Constitution. It does not imply automatic deference to legislative provisions without a serious and critical engagement of their consistency with the Constitution, nor does it imply according privileged status to existing common-law doctrines and rules. As André indicated in relation to legislation (ibid at 100–2):

> '[S]ubsidiarity principles cannot be applied mechanistically so as to exclude serious consideration of the constitutional principles underlying and directing any legislation, because doing so could undermine the principle of constitutional supremacy.'

He said a similar thing in relation to the common law (ibid at 96):

> 'It may very well sometimes be necessary to solve a particular dispute in terms of the common law rather on the basis of a constitutional rights provision, but both the decision to resort to development of the common law and the actual development of the common law should be animated by the desire to give effect to a particular constitutional right as well as the broad spectrum of constitutional principles and values.'

For André subsidiary principles were a way of ensuring a careful, structured engagement with the Constitution. He preferred to describe subsidiarity as an 'angle of approach' (a phrase he attributed to colleague Henk Botha) — an 'analytic rhythm' rather than a rigid doctrine which reinvented the hierarchies and formalism to which our legal culture is predisposed (ibid at 105).

André would often exhort us 'to leave no stone unturned' in examining the implications of purportedly neutral, innocuous background rules and doctrines for constitutionally directed transformation of our legal system. He was a rare academic who had a deep and broad knowledge of the common law, constitutional law as well as comparative law. This placed him in a unique position not only to detect and demonstrate the need for changes to legal rules and doctrines, but also — in close collaboration with his talented group of postgraduate students and associates — to work out the nature of these changes in diverse areas of property law such as evictions law, expropriation, neighbour law, servitudes, prescription, and many others. (For an overview of this work see A J van der Walt 'Property law in the constitutional democracy' (2017) 28 *Stellenbosch LR* 8.) In so doing, he left us with the legacy of a new property law fit for the purpose of serving the foundational values of our constitutional democracy.

Turning to André as a colleague in the Stellenbosch University Law Faculty, I will highlight three dimensions. First, André was an academic in the very best sense of the tradition. Despite his brilliance, he knew there was

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no substitute for long, lonely hours of reading and writing. He did not seek the limelight, nor did he aspire to be a 'public intellectual' through media appearances or related activities. However, because of his meticulous scholarship, his profound impact on South African and international property law and theory will endure.

Fundamental to his concept of academic citizenship was his commitment to training and mentoring a new generation of young legal academics and scholars. At the beginning of each year he ran a brilliant set of generic training seminars for postgraduate students in the Faculty on issues such as writing a research proposal; academic reading and writing strategies; referencing protocols; planning a career and so forth. I for one always made a point to attend at least one or two of these seminars a year. I never failed to benefit from André's passion for research and writing and to come away with new insights and inspiration for engaging in the process of research, writing and postgraduate supervision. His postgraduate students will attest to his brilliant training and mentorship of them as young academics.

Secondly, he was a generous colleague and friend to many in the Faculty — always interested in our research projects and willing to offer insights and advice on our careers, and professional dilemmas. These sessions were frequently conducted over coffee or, preferably, a glass of good red wine.

Finally, André was a passionate and principled advocate for social justice and transformation. He did not only preach this, but applied this in his research on constructing a more just property-law system for South Africa, in the diversity of young master's and doctoral candidates he selected to work with him in the South African Research Chair in Property Law, and in the stand he took for transformation and a more inclusive language policy within the Stellenbosch Law Faculty and the wider University. This took great courage, and often placed him at the margins of mainstream opinion, particularly within the Stellenbosch community. But it was consistent with André's respect for the transformative power of the margins in property law. He did not ever waver from his principles, and thereby gave us an abiding example of true leadership. It is my ardent hope that André's values and his example will be the beacons which guide the Stellenbosch University Law Faculty in charting its future course without him.

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